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In the Supreme Court of the United States

OCTOBER TERM, 1972

NO. 72-1033

STEVE RUSS,

Petitioner,

vs.

MIRA COMPANIA NAVIERA, S.A.
and STRAVELAKIS BROS. CO., LTD.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

FELDMAN & ABRAMSON
402 Ainsley Building
Miami, Florida 33132
Counsel for Petitioner

MIAMI REVIEW — 371-4853 — 377-3721

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Steve Russ, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered November 30, 1972, affirming an order setting aside defaults against the respondents, and that on hearing defaults be reinstated.

OPINIONS BELOW

The opinion of the Court of Appeals (App. 2) is not yet reported.

An opinion of the District Court granting the defendants' motions to set aside defaults is not reported (App. 4, 5).

JURISDICTION

The judgment of the Court of Appeals was entered on November 30, 1972. This Court has jurisdiction under 28 U.S.C.A. § 1254(1).

QUESTIONS PRESENTED

1. When defendants' motions directly misrepresent their reasons for not filing timely responsive pleadings to the complaint, when their sworn reasons show a desire to gamble on proper filing of return receipt cards showing service of process, and when their proposed answers are directly contradicted by their affidavits, is it gross abuse of discretion by a United States District Court judge to issue an order rewarding such conduct by setting aside a default entered by the clerk?

2. Does misrepresentation and calculated gambling present good cause for setting aside a default pursuant to F.R.C.P. 55?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Florida Statutes Annotated,
Section 48.161(1) (App. 18)
Section 48.19 (App. 18)

Federal Rules of Civil Procedure,
Rule 55 (App. 19)

U.S. Code Annotated, Title 28
Section 1651 (App. 19)
Section 1292(a) (App. 20)

STATEMENT OF THE CASE

1. On September 13, 1971, a seconded amended complaint and demand for jury trial was filed for injuries to a longshoreman engaged in stevedoring operations aboard the M/V IRA, at the Port of Miami and on navigable waters. It was alleged, *inter alia*, that said M/V IRA was owned or controlled at said time and place by Stravelakis Bros. Co., Ltd., and/or Mira Compania Naviera, S.A. The complaint was filed in the United States District Court for the Southern District of Florida, the basis of jurisdiction being diversity.

Both of these defendants were alleged to be foreign corporations not licensed to do business in Florida.

Service was attempted pursuant to Florida's long-arm watercraft statutes. They require service of process on the Florida Secretary of State and actual notice to the defendant by mail. There is also provision for the filing of the return receipt cards from such mailing.

The plaintiff began the service of such process on both defendants on October 11, 1971. Although the clerk entered default for failure to file responsive papers, these defaults were set aside by United States District Court Judge Peter T. Fay. The principal issue between the parties at that time centered on whether return receipt cards were necessary as neither such cards nor the letters they pertained to were ever returned to the sender. If actual notice were all that was necessary, as contended by plaintiff, then how could the defendants claim lack of such notice, as they hired attorneys to set aside defaults, notice of these never being supplied by the plaintiff.

2. On January 24, 1972, process on both defendants was again served on the Secretary of State of Florida.

3. On January 26, 1972, notice of service on the Secretary of State of Florida was mailed by plaintiff's counsel to both defendants.

4. On February 9, 1972, an affidavit, indicating sending of service, but lack of return receipt cards, was made by plaintiff's counsel.

5. Pursuant to motion, the court on February 14, 1972, granted a thirty-day extension in which to file the return receipt cards from the two defendants.

6. On March 3, 1972, plaintiff's counsel filed the return receipt card for Mira, showing receipt by them of process on February 1, 1972.

7. On March 7, 1972, a default was entered by the clerk as against Mira.

8. On March 7, 1972, plaintiff's counsel filed the return receipt card for Stravelakis, showing receipt by them of process on February 1, 1972.

9. On March 8, 1972, the clerk entered a default as against Stravelakis.

No notice of the filing of receipts or of defaults was sent to anyone representing either Mira or Stravelakis.

10. On March 9, 1972 defendant Mira filed a motion to set aside default with a copy of proposed answer. No affidavits were filed.

11. On March 15, 1972, plaintiff filed his "Memorandum in Opposition to Defendant Mira's Motion to Set Aside Default."

12. On March 16, 1972, defendant Mira filed a supplemental memorandum in support of its motion to set aside default.

13. On March 16, 1972, defendant Stravelakis filed its motion to set aside default with proposed answer. No affidavits were filed. They adopted the statements made by Mira.

14. On March 20, 1972, counsel for Mira and Stravelakis filed an affidavit.

15. On March 21, 1972, the lower court entered orders granting the motions of both Mira and Stravelakis to set aside entry of default.

16. On March 23, 1972, plaintiff moved to vacate the aforesaid orders and requested oral argument.

17. On March 28, 1972, the lower court denied plaintiff's motion without having heard argument.

The motion of March 9, 1972, stated, *inter alia*, that:

> "Defendant MIRA COMPANIA NAVIERA, S.A., (MIRA) moves this court for an order setting aside the default entered by the clerk on March 8, 1972, and as grounds therefor would show to the court as follows:
>
> 1. Said defendant has herewith filed its answer to the complaint.
>
> 2. Due to the great distance of the defendant, MIRA, from the Southern District of Florida, *said defendant was delayed in notifying its attorneys* of the fact that it had been served with the second amended complaint and demand for jury trial." (App. 7) (Emphasis supplied)

The March 16, 1972 supplemental memorandum of the defendants in support of the March 9, 1972 motion to set aside the default stated, in part:

> "1. Due to the great distance of MIRA from the Southern District of Florida and the inefficiency of foreign mails, said Defendant's attorneys *did not receive notice* of the fact that Defendant MIRA had been served with the Second Amended Complaint *until shortly before the default* was entered by the Clerk on March 7, 1972." (App. 11) (Emphasis supplied)

Then followed defendants' affidavit of March 20, 1972. This affidavit showed that local counsel was notified by his clients *almost immediately* after they received suit papers and not shortly before default was entered, as the motions had previously misrepresented.

"Some time *during the first week of February* of 1972, we received a telegram from MIRA's underwriters stating that suit papers had been received by the owners of the M/V IRA. Shortly thereafter, on or around the 8th or 9th of February, I examined the court file and noted that there was a summons directed to MIRA and to STRAVELAKIS BROTHERS which had been issued and served on the Secretary of State . . . " (App. 13) (Emphasis supplied)

Thus, local counsel was notified by his clients of suit one full month before default was entered.

The motions were, thus, gross misrepresentations to the Court. The affidavit is the tale of a calculated gamble that service of process would not be perfected by the filing of the return receipt cards even though both client and counsel had actual notice of the suit.

The affidavit further states that:

" . . . (S)uit papers had been received by the *owners* of the M/V IRA. Shortly thereafter, on or around the 8th or 9th of February . . . " (App. 13) (Emphasis supplied)

The proposed answers, filed with the respective motions, however, deny "each and every allegation of the complaint." Of course, the complaint alleges that Mira or Stravelakis is the owner of the M/V IRA.

An interlocutory appeal was taken to the United States Court of Appeals for the Fifth Circuit, as one from an interlocutory order in an admiralty and maritime claim within the meaning of 28 U.S.C.A. 1292(a)(3).

It appearing that the real gravamen of the complaint being diversity and that the appeal would not lie, the court was asked to treat the appeal as an application for a peremptory writ pursuant to 28 U.S.C.A. 1651. *La Buy v. Howes Leather Co.* (1957), 352 U.S. 249, 77 S.Ct. 309, 1 L.Ed.2d 290; *Schlagenhauf v. Holder* (1964), 379 U.S. 104, 85 S.Ct. 234, 13 L.Ed.2d 152; *Cord v. Smith* (9 Cir. 1964), 338 F.2d 516.

After hearing oral argument, the Honorable United States Court of Appeal issued its opinion on November 30, 1972.

> "PER CURIAM: The Order setting aside an earlier default judgment is not appealable, and the appeal is DISMISSED. Treating the matter as one seeking mandamus or other peremptory writ, there was *no abuse of discretion*, and such relief is DENIED." (App. 2) (Emphasis supplied)

Thus the Court of Appeals did entertain the application for a peremptory writ and denied it on its merits.

We seek review of the Honorable Court of Appeals' determination that "good cause" for setting aside of a default may be so found in the discretion of the District Court, where misrepresentation and outright gambling are the predicates thereof.

REASONS FOR GRANTING THE WRIT

We are aware that the law and this Honorable Court do not favor defaults.

On the other hand, we do not believe that a calculated gamble which is a losing proposition should be made a success by calculated misrepresentations to the judiciary.

In line with this reasoning, we would cite the following language from *Paramount Packaging Corp. v. H. B. Fuller Co. of N. J.* (D.C.Pa.1960), 190 F.Supp. 178:

> "... We feel the case before us differs from the cases cited by the defendant, in that here the defendant, acting through its officers, deliberately chose a course of action which it felt was tactically advantageous in the resistance of plaintiff's claim. There are no circumstances here that would justify granting the relief given in the cases cited by the defendant. To permit a defendant to ignore service of the Court's process in a belief that the process is invalid and then ask relief when that belief turns out to be mistaken would be intolerable. *A defendant who chooses to ignore a purported service of process does so at his own risk.*" (at p. 181) (Emphasis supplied)

To put the defendants' entire course of conduct in perspective, we would call this Honorable Court's attention to the following quotation from W. Barron & A. Holtzoff, *Federal Practice and Procedure*, § 1217 (Wright ed. 1958):

"Setting Aside Default.

A motion to set aside a default or a judgment by default is addressed to the discretion of the court, and an adequate basis for the motion must be shown. In exercising this discretion the court will be guided by the fact that default judgments are not favored in the law. Courts exist to do justice, and are properly reluctant to lend their processes to the enforcement of an unjust judgment. At the same time, the rules which require responsive pleadings within a limited time serve important social goals, and *a party should not be permitted to flout them with impunity.* In balancing these policies the court should not reopen a default judgment merely because the party in default requests it, but should require the party to show both that there was good reason for the default and that he has a meritorious defense to the action . . . " (at p. 89) (Emphasis supplied)

The facts are not in dispute; the law is not even fairly debatable. Yet, a United States District Court Judge, the Chief Judge of the United States Court of Appeals for the Fifth Circuit, a fellow judge of said court, and a distinguished judge of the United States Court of Appeals for the Second Circuit have felt that the conduct of the defendants-appellees-respondents is such as can countenance their relief from actions which are nothing short of evincing a complete disregard of the applicable rules and of the judicial system.

We respectfully submit that the judicial sanction of the actions herein can lead only to a loss of respect for the rule of law as a guiding principle of conduct.

The United States Court of Appeals "has so far departed from the accepted and usual course of judicial proceedings or has so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision."

Respectfully submitted,

FELDMAN & ABRAMSON
402 Ainsley Building
Miami, Florida 33132
Counsel for Petitioner

By
Donald Feldman

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition for A Writ of Certiorari and the accompanying Appendix ~~was mailed~~ by hand to Smathers & Thompson, Attorneys for Respondents MIRA and STRAVELAKIS, Alfred I. DuPont Building, Miami, Florida 33131, this 24 day of January, 1973.

Donald Feldman

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APPENDIX

in the Supreme Court of the United States

OCTOBER TERM, 1972

NO. _____

STEVE RUSS,

Petitioner,

vs.

MIRA COMPANIA NAVIERA, S.A.
and STRAVELAKIS BROS. CO., LTD.,

Respondents.

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[TITLE OMITTED]

ORDER AND JUDGMENT OF UNITED STATES COURT OF APPEALS,

dated November 20, 1972

CASE NO. 72-2092

PER CURIAM: The Order setting aside an earlier default judgment is not appealable, and the appeal is DISMISSED. Treating the matter as one seeking mandamus or other peremptory writ, there was no abuse of discretion, and such relief is DENIED.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the appeal in the above styled and numbered cause be, and the same is hereby, dismissed;

It is further ordered that plaintiff-appellant pay to defendants-appellees the costs on appeal to be taxed by the Clerk of this Court.

[TITLE OMITTED]

ORDER OF UNITED STATES DISTRICT JUDGE,

dated February 14, 1972

THIS CAUSE came before the Court on the following motion(s) of the Plaintiff, STEVE RUSS:

PLAINTIFF'S MOTION FOR EXTENSION OF TIME IN WHICH TO FILE RETURN RECEIPT CARDS.

The Court having considered the record it is ORDERED AND ADJUDGED that: the plaintiff's Motion for Extension of Time in Which to File Return Receipt Cards is hereby granted.

IT IS FURTHER ORDERED AND ADJUDGED that the plaintiff shall have thirty (30) days from the date of this Order in which to file with this Court the Return Receipt Cards.

DONE AND ORDERED at Miami, Southern District of Florida, this 14th day of February, 1972.

/s/ PETER T. FAY

UNITED STATES
DISTRICT JUDGE

App. 4

[TITLE OMITTED]

ORDER OF UNITED STATES DISTRICT JUDGE,

dated March 21, 1972

THIS CAUSE came before the Court on the following motion(s) of Defendant, Mira Compania Naviera, S.A.:

Motion To Set Aside Entry of Default.

The Court having considered the record, it is ORDERED AND ADJUDGED that: The Motion to Set Aside Entry of Default is hereby GRANTED.

DONE AND ORDERED at Miami, Southern District of Florida this 21st day of March, 1972.

/s/ PETER T. FAY

UNITED STATES
DISTRICT JUDGE

[TITLE OMITTED]

ORDER OF UNITED STATES DISTRICT JUDGE,

dated March 28, 1972

THIS CAUSE came before the Court on the following motion(s) of Defendant, Stravelakis Bros Co. Ltd.:

MOTION TO SET ASIDE ENTRY OF DEFAULT

The Court having considered the record, it is ORDERED AND ADJUDGED that: The Motion to Set Aside Entry of Default is GRANTED.

DONE AND ORDERED at Miami, Southern District of Florida, this 28th day of March, 1972.

/s/ PETER T. FAY

UNITED STATES
DISTRICT JUDGE

[TITLE OMITTED]

ORDER OF UNITED STATES DISTRICT JUDGE,

dated March 28, 1972

THIS CAUSE came before the Court on the following motion(s) of Plaintiff, Steve Russ:

Motion To Vacate Court's Order dated March 21, 1972.

The Court having considered the record, it is ORDERED AND ADJUDGED that: The Motion To Vacate Court's Order dated March 21, 1972 is hereby DENIED.

DONE AND ORDERED at Miami, Southern District of Florida, this 28th day of March, 1972.

/s/ PETER T. FAY

UNITED STATES
DISTRICT JUDGE

[TITLE OMITTED]

MOTION TO SET ASIDE ENTRY OF DEFAULT AND MEMORANDUM IN SUPPORT THEREOF

Defendant MIRA COMPANIA NAVIERA, S.A., (MIRA) moves this court for an order setting aside the default entered by the clerk on March 8, 1972, and the grounds therefor would show to the court as follows:

1. Said defendant has herewith filed its answer to the complaint.

2. Due to the great distance of the defendant, MIRA, from the Southern District of Florida, said defendant was delayed in notifying its attorneys of the fact that it had been served with the second amended complaint and demand for jury trial.

3. The record reflects that this court entered an order on February 15, 1972, granting plaintiff a 30 day extension of time within which to file its return receipts evidencing perfection of service of process under the Florida long arm statute. Thus, plaintiff did not strictly comply with the provision of the Florida long arm statute which required that the return receipts be filed by the return date.

4. The court having granted plaintiff an extension of time within which to perfect service of process undoubtedly based on the inefficiency of foreign postal services, it would be unfair and unjust for the court not to allow the aforesaid defendant to defend this lawsuit.

In support hereof defendant, MIRA, cites Rules no. 55(c) and 60(b) of Civil Procedure.

(Certificate of Service and Signatures omitted)

[TITLE OMITTED]

MOTION TO SET ASIDE ENTRY OF DEFAULT AND MEMORANDUM IN SUPPORT THEREOF IN BEHALF OF DEFENDANT, STRAVELAKIS BROS. CO., LTD.

Defendant, STRAVELAKIS BROS. CO., LTD. (STRAVELAKIS), moves this Court for the entry of an order setting aside the default entered by the Clerk on March 7, 1972, and as grounds therefor STRAVELAKIS incorporates herein the Motion to Set Aside Entry of Default filed on behalf of Defendant MIRA COMPANIA NAVIERA, S.A. and the Supplemental Memorandum of Law in Support of Defendant MIRA's Motion to Set Aside Entry of Default.

MEMORANDUM OF LAW

In support hereof, Defendant STRAVELAKIS cites Rule 55(c) and 60(b) of the Federal Rules of Civil Procedure.

(Signatures and Certificates of Service omitted)

[TITLE OMITTED]

ANSWER

Defendant MIRA COMPANIA NAVIERA, S.A. (MIRA) answers the complaint herein as follows:

Defendant MIRA denies each and every allegation of the complaint.

AFFIRMATIVE DEFENSES

1. If plaintiff's injuries occurred as alleged in the complaint, the sole and proximate cause of said injuries was the plaintiff's own negligence.

2. If said injuries occurred they were caused or contributed to by the plaintiff's own negligence.

(Certificate of Service and Signatures omitted)

[TITLE OMITTED]

ANSWER

Defendant, STRAVELAKIS BROS. CO., LTD. (STRAVELAKIS), answers the Complaint herein as follows:

Defendant STRAVELAKIS denies each and every allegation of the Complaint.

AFFIRMATIVE DEFENSES

1. If Plaintiff's injuries occurred as alleged in the Complaint, the sole and proximate cause of said injuries was the Plaintiff's own negligence.

2. If said injuries occurred, they were caused and/or contributed to by the Plaintiff's own negligence.
(Signatures and Certificate of Service omitted)

[TITLE OMITTED]

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF DEFENDANT MIRA COMPANIA NAVIERA, S.A.'S MOTION TO SET ASIDE ENTRY OF DEFAULT

In support of its Motion to Set Aside the Entry of Default, Defendant, MIRA COMPANIA NAVIERA, S.A., (MIRA) would show the following facts to the Court:

1. Due to the great distance of Defendant MIRA from the Southern District of Florida and inefficiency of foreign mails, said Defendant's attorneys did not receive notice of the fact that Defendant MIRA had been served with the Second Amended Complaint until shortly before the default was entered by the Clerk on March 7, 1972.

2. Defendant MIRA has entered its appearance through its attorneys and has filed its Answer to the Complaint, which raises the meritorious defense that Plaintiff's alleged injuries were caused entirely or contributed to by his own negligence.

3. Defendant MIRA filed its Answer and Motion to Set Aside the Entry of Default one day after its attorneys discovered that said default had been entered.

There has been no default judgment entered in this cause; consequently, the default entered by the Clerk is only an interlocutory act looking toward the subsequent entry of a final judgment by default. No judgment having been entered, Defendant's relief is determined by the provisions of Rule 55(c) of the Federal Rules of Civil Pro-

cedure which states that: "For good cause shown the Court may set aside an entry of default . . ." To obtain relief under this provision, the Defendant in default must show good cause why a response to the Complaint was not timely filed and that he has a meritorious defense to the claim. The determination of whether good cause exists rests in the sound discretion of the Court. In distinguishing the effect of an entry of a default as opposed to a default judgment Elias v. Pitucci, 13 F.R.D. 13 (E.D. Pa. 1952), held that a Court would be justified in setting aside a default under Rule 55(c) on a showing that would not move it to set aside a default judgment under Rule 60(b). See also 6 Moore's Federal Practice, Sec. 55.10(2), p. 1831 (1971).

* * *

(Signatures and Certificates of Service omitted)

[TITLE OMITTED]

AFFIDAVIT

STATE OF FLORIDA)
) SS
COUNTY OF DADE)

I, MERCER K. CLARKE, being duly sworn do depose and say:

I am an associate of the law firm of Smathers & Thompson which represents defendants MIRA COMPANIA NAVIERA, S.A. and STRAVELAKIS BROTHERS in the above styled lawsuit.

On December 30, 1971, this court entered an order setting aside a default previously entered against defendants MIRA and STRAVELAKIS and further quashing service of process on said defendants on the grounds that the plaintiff had failed to perfect service of process under the Florida long arm statute. At some subsequent time, plaintiff again initiated the procedure for serving defendants MIRA and STRAVELAKIS under the long arm statute, and on February 4, 1972, the summons was returned executed as to the Secretary of State. This office was never notified that service of process was again being attempted on defendants MIRA and STRAVELAKIS.

Some time during the first week of February of 1972, we received a telegram from MIRA's underwriters stating that suit papers had been received by the owners of the M/V IRA. Shortly thereafter, on or around the 8th or 9th of February, I examined the court file and noted that there

was a summons directed to MIRA and to STRAVELAKIS BROTHERS which had been issued and served on the Secretary of State. The only documentation in the file at that time indicating the date of service on the Secretary of State was the return from the U.S. Marshal's office for the Northern District of Florida which indicated that the summons and complaint had been served on the Secretary of State on January 21, 1972, at 1:15 P.M. The return itself was filed on February 4, 1972, along with the original summons. I was aware of the fact that the Florida long arm statute requires that return receipts indicating service of notice of the lawsuit on the defendant be filed with the court on or before the return date, which of course is 20 days after service of the summons and complaint on the Secretary of State. By my calculations the Marshal's return having indicated that the Secretary of State was served on January 21, the return receipts would have to have been filed by February 10, 1972, in order for service of process to have been perfected on defendants MIRA and STRAVELAKIS and the jurisdiction of the court to have attached. At the time that I checked the court file, the returns of the Marshal and the summons were the most recent papers filed in the file, all of which were filed on February 4. Neither plaintiff's subsequent motion for extension of time nor the order of the court granting that extension for 30 days had been filed on the date that I examined the court file during the first week of February. At that time I was under the very possibly erroneous impression that unless and until the plaintiff perfected service by fully complying with the long arm statute, the jurisdiction of the court could not attach to the defendants, and we were under no obligation to enter an appearance on their behalf.

Although I cannot pin-point the date, I asked our messenger to check the docket sheet on what I calculated to be the twentieth day after service of the summons on the Secretary of State, which the Marshal's return reflects was January 21. The twentieth day then would have been February 10. He reported that nothing new had been filed, and at that time I felt confident that jurisdiction of the court had not attached to our client. I did not consider the possibility that a motion for extension of time would be made that day and granted.

At some subsequent time, Mr. Marston from Fowler, White, Humkey, Burnett, Hurley & Banick, informed me that an order had been entered extending the time within which the plaintiff could file his return receipts. I had fully intended to check the court file immediately to determine the exact date of the extension, but I put it off due to other pressing matters until March 9, 1972, at which time I discovered that the return receipts had been filed. I then filed an answer on behalf of defendant MIRA and later on behalf of defendant STRAVELAKIS and motions and memorandums to put aside the defaults.

FURTHER AFFIANT SAITH NOT.

/s/ MERCER K. CLARKE

Mercer K. Clarke

(Notary's Subscription· Certificate of Service and Signature omitted)

* * *

App. 16

[TITLE OMITTED]

NOTICE OF FILING RETURN RECEIPT CARD,

dated March 3, 1972

Plaintiff hereby notices defendants of the filing of return receipt card, attached hereto, reflecting registered letter No. 631036 directed to Mira Compania Naviera S.A., c/o Stravelakis Bros. Co., Ltd. Piraeus, Greece.

(Certificate of Service and Signatures omitted)

* * *

NOTICE OF FILING RETURN RECEIPT CARD,

dated March 7, 1972

Plaintiff hereby notices defendants of the filing of return receipt card, attached hereto, reflecting registered letter No. 631035 directed to Stravelakis Bros., Piraeus, Greece.

(Certificate of Service and Signatures omitted)

* * *

48.161 Method of substituted service on nonresident

(1) When authorized by law, substituted service of process on a nonresident or a person who conceals his whereabouts by serving a public officer designated by law shall be made by leaving a copy of the process with a fee of $2.00 with the public officer or in his office. The service is sufficient service on a defendant who has appointed the public officer as his agent for the service of process. Notice of service and a copy of the process shall be sent forthwith by registered or certified mail by the plaintiff or his attorney to the defendant, and the defendant's return receipt and the affidavit of the plaintiff or his attorney of compliance herewith, filed on or before the return day of the process or within such time as the court allows . . .

48.19 Service on nonresidents operating a watercraft in the state

The operation, navigation or maintenance by a nonresident of a boat, ship, barge or other watercraft in the state, either in person or through others, and the acceptance thereby by the nonresident of the protection of the laws of this state for such watercraft or the operation, navigation or maintenance by a nonresident of a boat, ship, barge or other watercraft in the state, either in person or through others, other than under the laws of the state, or any person who is a resident of the state and who subsequently becomes a nonresident or conceals his whereabouts, constitutes an appointment by the nonresident of the secretary of state as the agent of the nonresident on whom all

process may be served in any action, or proceeding against the nonresident growing out of any accident or collision in which the nonresident may be involved while, either in person or through others, operating, navigating or maintaining a boat, ship, barge or other watercraft in the state. The acceptance by the operation, navigation or maintenance in the state of the watercraft is signification of each nonresident's agreement that any such process against him which is so served shall be of the same effect as if served on him personally.

FEDERAL RULES OF CIVIL PROCEDURE

RULE 55

DEFAULT

(a) Entry. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter his default.

U.S. CODE ANNOTATED, TITLE 28

Title 28, U.S. Code §1651(a) provides that:

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

Title 28, U.S. Code §1292(a)(3) provides that:

(a) The courts of appeals shall have jurisdiction of appeals from:

• • •

(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed . . .